

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 98-0233 RO**

**Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes  
For The Period: 1997**

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**ISSUES**

**I. Responsible Officer Liability – Duty to Remit Sales and Withholding Taxes**

**Authority:** IC 6-2.5-2-1; IC 6-3-4

Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995)

Taxpayer protests the Department's determination of responsible officer liability for sales and withholding taxes not paid during the assessment period.

**STATEMENT OF FACTS**

Taxpayer, an attorney, incorporated a business in Indiana in 1996 (hereinafter corporation "P"). Taxpayer listed himself as the registered agent for the corporation on the incorporation papers. In December of 1996 taxpayer filled out and signed the Indiana Department of Revenue Business Tax Application. The taxpayer listed his title as president of P. The last line of the Business Tax Application reads as follows:

I hereby certify that the statements are correct.

This application must be signed by the owner, general partner or corporate officer before the Department will accept it.

NOTE: Failure to remit sales tax due and/or income tax withheld is a felony punishable

by imprisonment, a fine of \$10,000 fraud penalty.

After the first line (I hereby certify...) the form asks for a signature, title, and date. Taxpayer signed the form, listed himself as president, and dated the form.

**I. Sales and Withholding Taxes – Responsible Officer**

**DISCUSSION**

A gross retail (sales) tax is imposed on retail transactions made in Indiana. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must “collect the tax as agent for the

Individuals may be held personally responsible for failing to remit any sales tax. In determining who may acquire personal liability, IC 6-2.5-9-3 is pertinent:

And individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes plus any penalties and interest attributable to those taxes, to the state.

An income tax is assessed on wages that employers pay to their employees. The employer is responsible, and liable, for deducting, retaining, and paying “the amount prescribed in [the] withholding instructions.” IC 6-3-4-8(a). Like the sales tax, employers hold the withholding tax in trust for the state.

IC 6-3-4-8(f) states in part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC 6-3 shall hold the same in trust for the state of Indiana. . . .

In order to determine which persons are personally liable for the payment of these “trust” taxes, the

Department must initially determine which parties had a duty to remit the taxes to the Department. Indiana Department of Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995), is instructive:

The method of determining whether a given individual is a responsible person is the same under the gross retail tax and the withholding tax . . . . An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department . . . . The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid.

The Indiana Supreme Court in Safayan identified three relevant factors:

- (1) the person's position within the power structure of the corporation;
- (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person's employment contract; and
- (3) whether the person actually exercised control over the finances of the business.

The Supreme Court also stated in Safayan that "where the individual was a high ranking officer, we presume that he or she had sufficient control over the company's finances to give rise to a duty to remit Id. at 273.

The taxpayer argues that he was not an officer of the corporation, nor was he a shareholder. Taxpayer states that his son asked him to incorporate company P. Taxpayer incorporated the business. With regard to the Business Tax Application, taxpayer's explanation is that his son was out of town and asked him to sign the application. As *indicia* that he was not an officer, shareholder, or employee of company P, taxpayer offers an affidavit of a former employee of company P. The affidavit states that the taxpayer was not an officer and that taxpayer did not manage the affairs of the business, and that the taxpayer's son was the "owner, sole stockholder and sole officer." The taxpayer also points to his son's signature on NSF checks to the Department and his son's signature on the Indiana Sales and Use Tax Voucher. The taxpayer contends that although he was mistaken in signing the Business Tax Application, that it was nonetheless understandable given that it was for his son. Taxpayer states that his son owes the tax and that his son is now in another state.

The Department notes that the taxpayer signed the Business Tax Application and listed himself as president of company P. The Department notes that the Business Tax Application states that it "*must* be signed by the owner, general partner or corporate officer . . . ." (Emphasis added) The language of the form is heightened, noting that failure to remit sales tax or income tax withheld is a felony and also subject to a large fine. Given that the taxpayer is an attorney, the Department argues, the taxpayer

should have known from the plain language of the form that his signature would make him open to liability. The Department also notes two maxims of jurisprudence: he who takes the benefit must bear the burden, and he who consents to an act is not wronged by it.

With regard to the taxpayer's argument that his son owes the tax, since his son signed the NSF checks and therefore had check writing authority, the Department notes that the officers (and others outlined by Safayan) are each personally, jointly and severally liable. The issue of the liability of the taxpayer's son is not dispositive on the issue of the taxpayer's liability, and his son's potential liability need not be addressed here.

### **FINDING**

The taxpayer's protest is denied.